UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Castro Valley, California)

EDEN MEDICAL CENTER
Employer

and

VICTORIA DREUKHAMMER, an Individual — Case 32-RD-1486
Petitioner

and

UNITED HEALTHCARE WORKERS WEST,
SERVICE EMPLOYEES INTERNATIONAL UNION
Union

DECISION AND DIRECTION OF ELECTION

Eden Medical Center, herein called the Employer, is engaged in the operation of an acute-care hospital at its Castro Valley, California facility. United Healthcare Workers West, and its affiliate Service Employees International Union, herein collectively called the Union, represents a collective-bargaining unit consisting of clerical employees employed at the Employer's Castro Valley facility.

On July 22, 2005, Victoria Druekhammer, an individual, herein called the Petitioner, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to decertify the Union as the collective bargaining representative of the employees in the clerical unit. On July 27, 2005, processing of the petition was administratively blocked because of certain pending unfair labor practice charges. On May 17, 2006, processing of the petition resumed and the instant hearing was conducted on May

24, and June 1, and 2, 2006.[1]

The Union contends that the decertification petition should be dismissed because: (1) the Petitioner is currently a statutory supervisor; (2) the Employer engaged in unfair labor practices prior to the instant petition that caused employees to reject the Union and, consistent with the Board's ruling in Saint Gobain Abrasives, Inc., 342 NLRB No. 29 (2004), the petition should be dismissed; and (3) the Employer and Union recently executed a contract settlement agreement that was intended by them to resolve various unfair practice allegations that preceded the filing of the decertification petition and, thus, pursuant to Super Shuttle of Orange County, Inc., 330 NLRB 1016 (2000), dismissal of the petition is required. Contrary to the Union's contentions, the Employer and Petitioner deny that the Petitioner is a statutory supervisor.[2] Moreover, the Employer takes the position that no causal nexus exists between the alleged unfair labor practices addressed by the parties' contract settlement agreement and the employee disaffection giving rise to the filing of the decertification petition, and it, therefore, contends that the contract settlement agreement does not constitute a basis for dismissing the petition.[3]

I have considered the evidence and arguments presented. For the reasons set forth below, I have concluded that an election is warranted in this case.

[1] On May 22, 2006, additional blocking charges were filed by the Union in Cases 32-CA-22653 and 32-CA-22662. Those charges were withdrawn by the Union on June 26, 2006 and no longer block the processing of the petition to election.

[2] The Petitioner chose not to present evidence at the hearing and did not take an active role in the proceedings, except to provide testimony as a witness.

[3] The Employer further argues in its post-hearing brief that the parties did not intend to settle the blocking charges so as to prevent the dismissal of the decertification petition. The brief sets forth statements between Hospital counsel and Union representative John Borsos, neither of whom were called to testify as witnesses, in support of this assertion. The Employer further argues that the Union should be estopped from taking a different position in this proceeding. In the absence of record testimony, I give no weight to the Employer's assertions regarding the parties' intentions with respect to the decertification petition.

FACTS

The Petitioner's Supervisory Status

The record reflects that at the time she filed the instant petition on July 22, 2005, the Petitioner was employed as the department secretary for the Employer's Neuroscience Center. In late October 2005, an opening was posted for a credentials coordinator position in the Medical Staff Department for which the Petitioner submitted a bid. In late November 2005, she was appointed to that position.[4]

The Petitioner and another credentials coordinator report to Lara Montano, Medical Staff Coordinator. In Montano's absence, the Petitioner reports to Debbie Hendrickson, Director of Medical Staff and Risk Management. Other department employees include the medical staff department secretary, a statement of concerns/claims employee, and a risk management coordinator.

The Petitioner's duties include coordinating the Employer's credentialing process by monitoring the applications of physicians and physician-allied health employees such as physician assistants, nurse practitioners, and certified nurse anesthetists who seek to be on the Employer's staff. The Petitioner sends physicians the appropriate departmental application with the requested privileges the physician is seeking. She answers questions physicians may have regarding the applications or privileges. The physicians return their filled-out applications and supporting documentation, and the Petitioner verifies their schooling, credentials, and any records regarding malpractice. The Petitioner's primary responsibility is to make sure that the physicians' applications and supporting documentation are complete.

[4] The credentials coordinator position is not included in the clerical unit represented by the Union. However, like the employees in the clerical unit, the Petitioner is hourly paid, and she receives overtime pay when directed to work overtime and she participates in the Employer's 401(k) program. She is also eligible to participate in the Employer's health care plan but declined to participate.

Montano supplies the Petitioner with the Medical Staff Department's by-laws so that she can determine what credentialing documents and information are required to be submitted by the applicant. The Petitioner has no input into the by-laws and is not authorized to set or change them in any respect. The Petitioner presents records of the information she accumulates from physicians and verifying organizations to department chairs.

After the relevant department chair verifies and signs off on the applications, the Petitioner submits the applications to a meeting of the Employer's Credentials Committee. The Credentials Committee consists of physicians currently on the Employer's medical staff representing each of the Employer's departments. These physicians review all applications and reappointments to determine whether the Employer will extend privileges to a particular physician. The Credentials Committee also reviews changes to privileges and reviews "proctoring," or monitoring, by current medical staff of newly credentialed physicians. The Credentials Committee makes a recommendation to the Employer's Medical Executive Committee regarding initial granting or renewing of physician privileges. The Petitioner attends the meetings of the Credentials Committee where these matters are discussed and decisions are made. However, she is not a voting member of the Credentials Committee. Her presence is necessary to answer questions committee members have regarding the records she has accumulated from the physician-applicants and other sources. Thus, for example, committee members may be unable to find information in an applicant's file. The Petitioner is present to show the committee members where the relevant information is located so that they can make their decision about a particular application. The Petitioner makes no recommendations regarding any application. On occasion, the Petitioner has been assigned by Montano to take minutes of Credentials Committee meetings in the absence of the other

credentials coordinator who usually performs the note taking function.

The record establishes that there are no employees who report to the Petitioner. The record also establishes that the Petitioner has no authority to hire, fire, discipline, transfer, suspend, lay off, recall, promote, resolve grievances, perform evaluations, assign, direct, or make recommendations regarding the above actions.

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. Kentucky River Community Care, Inc., 532 U.S. 706 (2001). There is a three-part test for establishing supervisory status. Employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires use of independent judgment; and (3) their authority is held in the interest of the employer. Kentucky River, supra. The exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner or through giving some instructions or minor orders to other employees does not confer supervisory status. Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985).

The Union asserts in its post-hearing brief that the Petitioner is a statutory supervisor based on her authority to assign and direct Medical Staff Department employees to answer telephone calls. The record reflects that all Medical Staff Department employees are required to answer departmental phones and transfer calls to the appropriate staff members on a rotational basis. If the Petitioner is too busy with other tasks to answer telephones, she informs other department staff that she cannot do so, and they cover the department telephones without her assistance. However, she testified that she has no authority to direct employees to answer the department telephones and no action, such as discipline, would

follow if an employee refused to cover telephones for the Petitioner. Thus, it is apparent that the Petitioner simply requests other staff members to assist her to answer the telephones. Even assuming that she directs employees to answer telephones when she is busy, this "authority" is nothing more than a routine and perfunctory instruction.

The Union presented no other evidence to support its assertion that the Petitioner is possessed of 2(11) authority. Thus, in light of the above, the Union has failed to meet its burden to establish that the Petitioner has the authority to responsibly assign or direct employees with regard to answering department phone calls, or with regard to the performance of any other job function. In sum, I find that the Petitioner is not a statutory supervisor.

The Board has held that a supervisor may not file a decertification petition in either her capacity as a management representative or as an individual acting on behalf of employees. See Clyde J. Merris, 77 NLRB 1375 (1948); Weyerhaeuser Timber Company, 93 NLRB 842 (1951). In the instant case, however, the parties agree that the Petitioner was a nonsupervisory clerical unit employee at the time she filed the petition. Her current status as a nonbargaining unit employee, and, as I have found above, a nonsupervisory employee who participated in the hearing, does not affect her status as the Petitioner, nor does it present any infirmity to the validity of the instant petition.

Section 9(c)(1)(A) of the Act provides that a petition for certification or decertification may be filed by "an employee or group of employees or any individual or labor organization acting on their behalf." There is no requirement that a decertification petitioner be a member of the bargaining unit. See, generally, Abbott Laboratories, 131 NLRB 569, 571, fn. 2 (1961); The William J. Burns International Detective Agency, Inc., 138 NLRB 447, 449, fn. 1 (1962).

Thus, at all times material herein, including at the time of the hearing, the Petitioner has met the Section 9(c)(1)(A) definition of an individual acting on behalf of the unit employees.

The Employer's Alleged Unfair Labor Practices And The Instant Decertification Petition

The Employer is an affiliate-member of a network of acute care hospitals located throughout Northern California owned by Sutter Health, Inc. Separate collective-bargaining contracts cover employees of certain affiliate-members, including the Employer. For decades the Union has been the representative of a unit of approximately 180 of the Employer's service and technical employees, herein called the service/technical unit. On February 6, 2003, the Union was certified as the collective-bargaining representative of approximately 150 clerical employees employed in a separate unit, herein called the clerical unit.

In April 2003, the parties began negotiations for an initial collective-bargaining agreement for the clerical unit. By December 2003, the Employer presented its best, last, and final offer covering the clerical unit. In January 2004, the offer was rejected by the clerical unit employees and bargaining continued until the summer of 2004.[5] The contract covering the service/technical unit was scheduled to expire on June 30, and negotiations for a successor contract covering that unit began on June 16. Although the Union sought to conduct coordinated negotiation meetings covering both units, the Employer maintained that negotiations should remain separate for each unit. Nevertheless, by June, the Employer released members of the clerical unit bargaining committee to attend the negotiation sessions for the service/technical unit and separate negotiations for the clerical unit were discontinued.

[5] All dates hereafter refer to 2004, unless otherwise specified.

1. The Alleged Unilateral Change in Paid Time Off in Case 32-CA-21492

The Employer had a long standing policy, in both the clerical unit and service/technical unit, by which it allowed employees to be paid for accumulated but unused vacation. Thus, employees could request paid time off, commonly referred to as "PTO," prior to the close of the pay period, and the Employer generally honored their request by issuing them a PTO pay check the following pay period. This practice was set forth in provisions of the service and technical unit contract, and was a status quo working condition in the clerical unit. In the summer of 2004, the Union received reports from employees that the Employer was denying PTO requests[6].

On July 8, the Union filed the charge in Case 32-CA-21492, alleging that the Employer's unilateral refusal to honor PTO provisions in the parties' contract violated Section 8(a)(1), (3) and (5) of the Act. The only contract in existence at the time was the service/technical unit contract.

Reports of the Employer's denial of PTO continued until shortly before December 1, when the Union conducted a one-day strike, discussed below. Thus, immediately prior to the one-day-strike, a clerical unit employee reported to clerical unit shop steward Doug Jones that another clerical unit employee had reported that the Employer did not honor his or her request for PTO prior to the strike.[7] During this same time period, service/technical unit employees also reported to Jones that the Employer was no longer honoring their requests for PTO.

[6] It is not clear from the record whether the initial reports came from clerical unit or service and technical unit employees, or both.

[7] The record does not reflect whether or not any other clerical unit employees were denied PTO.

2. The Alleged Unilateral Change in Concurrent Employment in Case 32-CA-21514

In May, the Employer announced that it had purchased San Leandro Medical Center and that, effective July 1, it would operate that facility as an additional Employer campus. There were potential issues regarding how the employees would be merged at both facilities. Even prior to the purchase of San Leandro Medical Center, certain employees in both the clerical unit and service/technical unit worked at both facilities.[8] During a service/technical unit bargaining session in late June, the Union questioned the Employer about whether the purchase of San Leandro Medical Center would affect any of the terms and conditions of employment in any bargaining unit. The Employer representatives assured the Union that there would be no impact.

Thereafter, however, Jones received reports from employees that the Employer had issued a June 25 memo advising all employees who worked at the Employer and San Leandro Medical Center that concurrent employment would be discontinued.[9] Employees were required to choose which facility they wished to work at by the following week, and they were informed that they would be employed at the chosen facility only. If they did not so notify the Employer of their choice, they would be assigned to one of the facilities by the Employer. The record reflects that three clerical unit employees and 12 other employees employed outside the clerical unit were known by Jones to have received the June 25 memo. The record does not establish if the Employer continues to prohibit employees from working at both facilities.

[8] The record does not reflect how many employees from each unit were concurrently employed by the Employer at that time.

[9] The record is unclear as to whether the employees reporting this information to the shop steward were clerical or service/technical unit employees, or both.

On July 19, the Union filed the charge in Case 32-CA-21514 alleging that the unilateral elimination of concurrent employment violated Section 8(a)(1)(and (5) of the Act. The charge did not identify whether the allegations related to the clerical unit and/or the service/technical unit.[10]

3. The One-Day-Strike and the Alleged Unlawful Lockout in Case 32-CA-21860 (20-CA-32345)

In October, the Union scheduled a November 18 strike vote in both the clerical and service/technical units. In the weeks leading up to the strike vote, the Employer distributed literature to clerical unit employees urging them to vote against a strike. The literature was also sent directly to clerical unit employees' homes and posted by the Employer in various departments. Employees were advised that if they supported a strike, they would be locked out for four days. The same literature also accused the Union of intentionally delaying the contract negotiations and wage and benefit increases by not allowing the employees to vote on the Employer's final offer and by insisting that the Employer enter into a master contract with other Sutter-affiliated facilities.[11]

In addition, six employee forums on three different shifts were conducted by the Employer's Chief Executive Officer, during which he reiterated the information set forth in the Employer's literature. Thus, he addressed the Union's dilatory tactics and the strike issue, reiterating that the Employer would lock out employees who participated in any strike for four

[10] On September 20, further proceedings in Cases 32-CA-21492 and 32-CA-21514 were deferred pending resolution of grievances filed by the Union pursuant to the service/technical unit contract over the Employer's alleged unilateral actions. Administrative notice is taken that the Union did not file an appeal to the decision to defer these charges on the basis that the deferral was limited to the service/technical unit.

[11] Administrative notice is taken that on November 23, the Employer filed a charge in Case 32-CB-5887 alleging that the Union violated Section 8(b)(3) of the Act by attempting to force through its strike notice multi-employer bargaining for a master contract between it and all the Sutter-affiliated hospitals and by insisting on the merger of the clerical unit with the service/technical unit. The charge further alleged that the Union, in support of its unlawful objectives, engaged in bad faith bargaining through its dilatory tactics of refusing to set dates for bargaining and refusing to meet before 4:00 p.m.

days. Twenty to thirty employees attended each forum[12]. The Union also distributed literature to clerical and service/technical unit employees regarding the strike. One flyer urged a one day strike over "unfair labor practices." Another flyer urged a strike vote "to stop Sutter's unfair labor practices." However, neither the PTO nor the concurrent employment unilateral change allegations covered by the charges in Cases 32-CA-21492 or 32-CA-21514 were mentioned in either flyer.

On November 18, the clerical unit and service and technical unit employees voted to engage in a one day strike on December 1. The record reflects that there were numerous discussions between Shop Steward Jones and clerical unit employees regarding their concerns over the strike and anticipated lockout by the Employer.[13] Thus, Jones discussed the lawfulness of a four day lock out with clerical unit employees. Employees were aware that in 2002, a four day lock out of employees who had participated in a one day strike was deemed unlawful conduct by the employer of another Sutter-affiliated hospital. The employees expressed hope that if they were, in fact, locked out by the Employer, there would be a similar determination and remedy. Other clerical unit employees advised Jones that they would not participate in the strike because, in view of the anticipated four-day lockout, they could not financially afford to miss five days of work.

4. The Alleged Unlawful Lockout in Case 32-CA-21860 (20-CA-32345)

On December 1, 70 clerical unit employees and 80 service/technical unit employees participated in a one day strike at the Employer's premises. Employees employed at other Sutter affiliated facilities in Northern California also participated in the strike. The employees

[12] The record does not indicate how many, if any, of the clerical unit employees, other than the clerical unit shop steward, attended these meetings.

[13] The record does not establish the number of clerical unit employees with whom Jones had these conversations.

unconditionally offered to return to work on December 2, but were not allowed to return. About 50 employees reported to the facility en masse the morning of December 2 at 6:00 a.m. Dozens of other employees attempted to return to work over the course of the morning and afternoon. They were met at the entrance by security guards and the Employer's administrators who refused to allow the employees to enter the facility. The striking employees were not allowed to return to work until December 6. The subject of the strike and lockout remained a topic of discussion amongst the Employer's employees for about a month after the lockout. Employees expressed their displeasure with the Employer for locking them out.[14] The record also reflects that there were discussions among employees who did not cross the picket line during which they expressed their relief that they had not been locked out by the Employer.[15]

On January 27, 2005, the Union filed the charge in Case 32-CA-21860 alleging that the December 2 through 5 lockout of striking employees violated Section 8(a)(1), (3), and (5) of the Act. The charge also involved an allegation that the Employer unilaterally assigned non-unit employees to perform the unit work of locked-out employees. This charge was renumbered to Case 20-CA-32345 when it was transferred to Region 20 where numerous charges were pending arising out of related strike activities at other Sutter-affiliated hospitals in Northern California during the same time period.[16]

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[14] The record does not reflect how many employees engaged in such discussions, or what portion of them were clerical unit employees. There is no evidence in the record that any clerical unit employees discussed their displeasure with the Union arising out of the strike and lockout.

[15] The record does not reflect whether the employees who engaged in these discussions were clerical unit employees.

[16] On October 25, 2005, an Order Consolidating Cases and Consolidated Complaint and Notice of Hearing issued encompassing the 8(a)(1), (3), and (5) allegations of the charge in Case 20-CA-32345 and the other charges relating to the strike at various Sutter-affiliated hospitals. The Consolidated Complaint did not include the clerical unit as part of the unlawful lockout allegation. However, the parties stipulated that, had the unfair labor practice hearing been conducted, the Consolidated Complaint would have been amended to allege the

5. The Alleged Unlawful Discipline in Case 32-CA-21828

On or about December 6 when employees returned to work, Shop Steward Jones was advised by a clerical unit medical records clerk who had participated in the strike that she was not allowed to return to work with other returning employees. Jones and a Union organizer went to the Medical Records Department manager's office to investigate the clerk's claims. There was discussion about whether the clerk had participated in the strike or had simply not been scheduled to work the day of the strike, and an altercation developed. The department manager refused to speak any further with Jones and the Union organizer regarding the clerk's status and called security. Jones did not leave until a few minutes after security arrived. This incident took place in view and hearing of four or five clerical unit employees employed in the Medical Records Department.

The following day, Jones, who was employed in the clerical unit as an administrative assistant in the Outpatient Surgery Department, returned to the Medical Records Department to fulfill his regular job duty to deliver the operating room and outpatient surgery schedule. In delivering the schedule, he spoke with the Medical Records Department employee assigned to process the schedule, as he regularly did, in full view of the four or five clerical unit employees in the Medical Records Department.[17]

On December 9, when Jones reported to work, he was issued an "Informal Counseling (Documented)," the first level of discipline pursuant to the Employer's progressive disciplinary system. The counseling cited Jones for his disruptive conduct in entering the Medical Records Department on December 6 and for entering the Medical Records

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Employer's 8(a)(3) lock out of clerical unit employees and the 8(a)(5) unilateral assignment of non-clerical unit employees to clerical unit work.

[17] The record does not reflect whether the Medical Records Manager spoke to Jones on December 7 or asked him to leave the department.

Department on December 7 and engaging an employee in conversation. No clerical unit employees were present when the discipline was issued to Jones. However, Medical Records Department employees were aware that Jones had been disciplined because they were interviewed as witnesses by other Union representatives thereafter for purposes of pursuing a grievance and unfair labor practice charge. The information that Jones was disciplined was disseminated to other employees as well.[18]

On January 13, 2005, the Union filed the charge in Case 32-CA-21828 alleging, inter alia, that the Employer violated Section 8(a)(3) of the Act by issuing discriminatory discipline to Jones.[19]

6. The Alleged Unilateral Change Limiting Union Access After 8:00 P.M. in Case 32-CA-22021

Prior to Spring 2005, Union representatives had access to the Employer's facility, without restrictions as to time, to conduct Union business and to talk to unit employees on non-working time in the cafeteria, break rooms, or hallways. Thus, Union representatives routinely met with employees scheduled to the evening and graveyard shifts at the facility after 8:00 p.m. Sometime in April 2005, Union representatives Greg Nammacher and Pete Clayton were at the facility a few minutes after 8:00 p.m. to meet with workers on their evening breaks. The purpose of meeting was to inform employees regarding negotiations and to enforce the service and technical unit contract. The Employer denied Nammacher and Clayton access to meet with employees on the basis that it was after 8:00 p.m. They refused to leave, and security guards called the police. In addition to Nammacher and Clayton, this

[18] The record does not reflect how many other employees were aware of the discipline, how they learned about the discipline, or whether they were members of the clerical unit.

[19] The other allegations in Case 32-CA-21828 were dismissed on October 31, 2005. However, merit was found to the allegation concerning Jones' discipline to the extent that he was disciplined on December 9, in part, for performing his job duties as an administrative assistant in a manner consistent with his regular practice.

confrontation involved two security guards, four employees[20], two hospital administrators, and two police officers. Six employees, including two clerical unit PBX operators, observed the confrontation and the removal of the Union representatives from the facility by the police. The Employer removed Nammacher in a similar fashion on four additional occasions when he visited the hospital alone during this time period.[21]

The record reflects that 120 of the 150 clerical unit employees work on the day shift. Twenty clerical unit employees work on the evening shift between 6:30 p.m. and midnight. Ten clerical unit employees work on the graveyard shift between 11:00 p.m. to 7:30 a.m. Clayton testified that the unilaterally imposed 8:00 p.m. rule restricted access to evening employees because Union representatives had to wait to meet with those employees until they were on their breaks, well after 6:30 p.m., and totally restricted access to graveyard employees on their various break times.[22]

On April 27, 2005, the Union filed the charge in Case 32-CA-22021, alleging that the Employer violated Section 8(a)(1), (3), and (5) of the Act by unilaterally imposing restrictions on the right of Union representatives to visit the hospital to meet with employees and conduct other Union business.[23] The record evidence did not establish whether the Employer continued to restrict the Union's access to the hospital at the time that the decertification petition was filed.

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[20] The record does not establish whether any of these employees were clerical unit employees.

[21] The record does not contain any evidence as to the circumstances surrounding these additional removals and whether they were observed by any clerical unit employees.

[22] There is no record evidence that any particular clerical unit employee sought to meet with a Union representative after 8:00 p.m. and was denied access to such representation as a result of the alleged unilaterally implemented rule.

[23] Although it appears from the dismissal letter in Case 32-CA-21828 (the discipline of Jones) that this allegation was raised in that charge, administrative notice is taken that the unilateral change in Union access after 8:00 p.m. allegation was covered by the charge in Case 32-CA-22021.

7. The Decertification Petition Is Filed

The record reflects that on or about early July 2005, employees began to circulate a decertification petition which was filed by the Petitioner on July 22. Administrative notice is taken that 71 of 150 clerical unit employees signed the petition. As set forth above, at the time the petition was filed, there were three pending charges alleging unilateral changes in PTO, concurrent employment, and Union access. There were two additional pending charges concerning the discipline of Jones, the four-day lockout, and the assignment of bargaining unit work to non-bargaining unit employees during the lockout. In addition, as set forth above, there was a pending charge against the Union in Case 32-CB-5887 alleging bad faith bargaining.

Rose Alameda, a clerical unit employee, testified that, at the time she helped the Petitioner circulate the petition, no clerical unit employee raised the subject of the unilateral changes in PTO or concurrent employment, Jones' discipline, or the lockout with her. Similarly, there is no evidence that any employee raised the allegations in Case 32-CB-5887 that the Union had engaged in bad faith bargaining by engaging in delaying tactics or insisting to impasse regarding coordinated bargaining. However, the record reflects that during the period that the petition was being circulated, certain members of the clerical unit expressed their frustration with the Union due to the lack of clerical unit negotiations and the absence of a clerical unit contract.[24] The record also reflects that there were discussions among clerical unit employees who did not sign the petition about whether the Teamsters union, with whom the Employer had a contract, was a better, or stronger, union than the Union. On July 27, 2005, the parties were advised that the petition was blocked pending final disposition of the

[24] The record does not establish how many clerical unit employees had expressed dissatisfaction with the Union as of June 2004.

Employer's alleged unfair labor practices. Payroll records reflect relative stability within the clerical unit. Thus, of the 155 clerical unit employees employed on July 1, 2005, 134 were employed on December 1, 2004.[25]

8. Resolution of the Unfair Labor Practices

Administrative notice is taken that a merit determination was reached in Case 32-CB-5887 with respect to the dilatory tactics engaged in by the Union, including the time taken up during negotiations to discuss a master contract and coordinated bargaining. Thereafter, on July 29, 2005, the Union executed an Informal Settlement Agreement and Notice which was approved on October 2, 2005. The Notice was posted by the Union on January 4, 2006 and the case was closed on March 1, 2006.

In February, 2006, the parties executed an Informal Settlement Agreement and Notice to Employees covering the December 9, 2005 discipline issued to Jones and the April 2005 unilateral change in access allegations. The Informal Settlement Agreement was approved on February 22, 2006.

On or about March 7, 2006, the parties reached an overall agreement on a single contract for the service/technical unit and the clerical unit, but they agreed that each unit would remain separate, herein called the Contract Settlement Agreement. The contract was ratified by the clerical unit and service/technical unit employees in a combined vote. As part of this universal agreement, it was agreed that both parties would "dismiss all pending unfair labor practices and litigation." The parties further agreed that any unfair labor practice

[25] After the decertification petition was filed, the Union filed additional charges against the Employer concerning post-decertification petition conduct. In Case 32-CA-22399, filed on December 13, 2005, and Case 32-CA-22497, filed on February 13, 2006, the Union alleged violations of Section 8(a)(1), (3), and (4) of the Act for issuing discriminatory discipline to employees. In addition, the charge in Case 32-CA-22573, filed on March 7, 2006, alleged that the Employer violated Section 8(a)(1)and (2) of the Act by providing monetary benefits to anti-Union employees.

charges currently being treated by the Region as blocking charges would be considered withdrawn by the Union. No evidence was submitted by either party, other than the Contract Settlement Agreement, regarding the settlement, how it was reached, or what positions the parties took in settlement negotiations.

After the Contract Settlement Agreement was reached, the post-decertification petition charges in Cases 32-CA-22399, 32-CA-22497, and 32-CA-22573 alleging violations of Section 8(a)(1), (2), (3), and (4) were withdrawn by the Union. On April 3, the Consolidated Complaint covering the lockout allegations in Case 32-CA-21860/20-CA-32345 was withdrawn, after the Union requested withdrawal of the underlying charges. As regards deferred Cases 32-CA-21492 and 32-CA-21514, the record reflects that a dismissal letter issued on May 11, 2006, stating that the charges were dismissed pursuant to the language in the Contract Settlement Agreement by which the parties had agreed to "dismiss all pending ULP charges and pending court litigation between them or their representatives."

It appears that no action was taken, either by the Union or the Employer, to seek dismissal of or to withdraw the charges in Cases 32-CA-21828 or 32-CA-22021 pursuant to the Contract Settlement Agreement. As set forth above, an executed Informal Settlement Agreement and Notice in these cases was approved on February 22, 2006, and the cases were closed after the expiration of the Notice posting period on May 31, 2006.

ANALYSIS

In seeking dismissal of the petition, the Union relies on Super Shuttle of Orange County, Inc., 330 NLRB 1016 (2000). There, the Board held that a rival union's election petition should be dismissed because the incumbent union and the employer had negotiated a collective-bargaining agreement that was intended by them to resolve outstanding Section

8(a)(5) allegations concerning conduct that preceded the filing of the petition. In so holding, the Board relied on Douglas-Randall, 320 NLRB 431 (1995), and Liberty Fabrics, Inc., 327 NLRB 38 (1998), and noted with respect to Douglas-Randall that the Board in that case "described only three situations where resolution of pending charges *similar to those in this case* would not result in dismissal of the petition: where the blocking charges have been unconditionally withdrawn without Board settlement, dismissed as lacking in merit, or litigated and found to be without merit." 330 NLRB at 1017 (emphasis added).

All three of the foregoing cases involve allegations of the sort of Section 8(a)(5) violations that the Board appears to have presumed were sufficient to taint the election petitions that followed those alleged violations. Thus, as described by the Board in Liberty Fabrics, the alleged unlawful conduct at issue there "was in derogation of the bargaining relationship" and involved "the type of unfair labor practices that would preclude a question concerning representation under Douglas-Randall." 327 NLRB at 38 & n.3. Similarly, in Douglas-Randall, the Board, in explaining its decision, noted that to have decided the case otherwise would enable a settling employer to "benefit from its unlawful conduct by having the union decertified or replaced because of dissatisfaction with the incumbent union arising from the [employer's] unfair labor practice." 320 NLRB at 433.

In light of the foregoing, a determination must be made in this case as to whether the alleged unfair labor practices at issue here are the type that would preclude a question concerning representation. That determination requires consideration of the Board's post-Super Shuttle decision in Saint Gobain Abrasives, Inc., 342 NLRB No. 39 (2004), where the Board remanded for hearing a decertification petition that had been administratively dismissed following the issuance of a complaint alleging a pre-petition unilateral change in

the unit employees' health insurance program. In remanding the case, the Board held that a causal nexus could not be presumed between the alleged bargaining violation and the filing of the petition but, instead, had to be established in a hearing. Moreover, in responding to the dissent's reliance on certain other pre-petition unfair labor practice allegations that were the subject of an informal settlement, the Board majority noted that the settled allegations were unproven and that there was "no showing of a causal nexus between that alleged conduct and the loss of support for the Union." 342 NLRB at 435.

For purposes of establishing a nexus, the Board in Saint Gobain held that the multi-factor test set forth in Master Slack Corp., 271 NLRB 78 (1984), and its progeny should be applied to determine if the election petition had been tainted by the employer's alleged unfair labor practices. Those factors include: (1) an examination of the length of time between the unfair labor practices and the subsequent lack of support for the union, (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees, (3) the tendency of the violations to cause employee disaffection, and (4) the effect of the unfair labor practices on employee morale, organizational activities, and membership in the union. Master Slack Corp., 271 NLRB at 78.

In reconciling the Board's decision in St. Gobain with its earlier decision in Super Shuttle, it appears, based on Super Shuttle, that the unfair labor practice allegations encompassed by the settlement at issue here must be viewed as meritorious in considering their impact on the decertification petition. However, applying St. Gobain, those allegations, which do not involve a general refusal to bargain, cannot be presumptively relied upon as a basis for administratively dismissing the petition. See LTD Ceramics, Inc., 341 NLRB 86, 89 (2004). Rather, a Master Slack analysis of hearing-derived record evidence is required in

order to determine whether those unfair labor practice allegations were sufficient to preclude a question concerning representation. Accordingly, I will now consider those allegations in light of the four-part Master Slack analysis.

Alleged Unilateral Change Regarding Paid Time Off (PTO)

As regards the allegation that the Employer unilaterally began denying employee claims for payment in lieu of accumulated but unused vacation (denial of PTO), that alleged change (alleged in Case 32-CA-21492) is claimed by the Union to have commenced in July 2004, approximately one year before the decertification petition was filed. Although the record reflects that the Employer denied PTO as of the time of the one-day strike on December 1, 2004, no evidence was presented that the Employer continued to deny PTO to clerical unit employees in the seven months between the December 1 one-day strike and the filing of the decertification petition. Thus, the temporal relationship between the alleged unlawful denial of PTO and the filing of the petition is remote.

As regards the other Master Slack factors, the record reveals that there was no official announcement by the Employer of a discontinuance of PTO, and there is no evidence that any clerical unit employee had experienced a denial of PTO prior to the charge being filed. Indeed, the only evidence that any clerical unit employee was affected by the alleged unilateral change is Shop Steward Doug Jones' hearsay testimony that an employee told him about another employee's assertion that he or she had been denied PTO around the time of the December 1, 2004 strike. The record does not establish the circumstances surrounding this unidentified third person's request for PTO, such as whether the employee met the time requirements for making a PTO request by the end of the proper pay period.

In sum, given the remoteness in time of the alleged denial of PTO, the Union's failure to present any evidence regarding the circumstances surrounding that alleged denial, and the absence of any evidence that other unit employees were aware of the matter, there is an insufficient basis for finding a nexus between the Employer's allegedly unlawful denial of PTO and the filing of the decertification petition.

Alleged Unilateral Change Regarding Concurrent Employment

As regards the allegation that the Employer unlawfully discontinued the practice of allowing employees to concurrently work at both its Eden facility and its newly acquired facility in San Leandro (alleged in Case 32-CA-21514), the evidence with respect to that allegation indicated that the change occurred over one year before the filing of the decertification petition. There is no evidence regarding how many clerical unit employees enjoyed concurrent employment prior to the alleged change. Shop Steward Jones knew of only three clerical unit employees in a unit of 150 who received the June 25, 2004 letter advising of the changes in concurrent employment. There is no evidence that they or any of the other clerical unit employees were aware that the Employer had failed to bargain with the Union regarding the changes in concurrent employment prior to implementing the change. In addition, there is no evidence regarding the amount of work these three employees lost because they had to limit their employment to one facility, whether any of the employees voluntarily gave up their employment at the Castro Valley facility, or the other circumstances surrounding this alleged unilateral change. Moreover, there was no showing that, at the time of the decertification petition, there was any discussion among employees regarding the matter of concurrent employment.

In these circumstances, I find an insufficient basis from which to conclude that this alleged violation precluded a question concerning representation. Thus, the conduct at issue was remote in time from the filing of the petition, and there was no showing that it had a detrimental or lasting effect on employees, diminished the standing of the Union in their eyes so as to cause the disaffection, or adversely affected employees' morale, organizational activities, or union membership. See LTD Ceramics, Inc., 342 NLRB 86 (2004).

Written Discipline Issued to Union Steward Jones

The written discipline issued to Union Steward Jones on December 9, 2004, was a step one write up--the lowest level of discipline he could have received under the Employer's progressive discipline system. News of the discipline does not appear to have been widely disseminated, for the record shows that only 5 of 150 clerical unit employees were aware that Jones had been disciplined as a result of his presence in the Medical Records Department on December 6 and 7. Given the relatively minor nature of the discipline, its remoteness in time to the filing of the decertification petition, the lack of dissemination, and the absence of any lasting adverse impact on employee support for the Union, there is an insufficient basis for finding a nexus between that discipline and the filing of the decertification petition.

Unilateral Change in Access

With respect to the unilateral change in access allegation, which concerns actions taken by the Employer in April 2005 to prevent Union Business Representatives Nammacher and Clayton from accessing the Employer's facility after 8:00 p.m., the record demonstrates that only 30 of 150 clerical unit employees are assigned to work during the time in which access allegedly was denied. Out of that 30, only two clerical unit employees, the PBX operators, were shown to have been aware that Union representatives were being denied

access to the Employer's facility after 8:00 p.m., or that Union representatives were escorted from the facility for violating that newly implemented rule. There is no evidence that news of the Employer's conduct was disseminated to other clerical unit employees. Nor is there evidence that any clerical unit employee was aware that the Employer had not bargained with the Union over the unilateral change in access. Furthermore, no evidence was presented that during the four months prior to the decertification activities, any clerical unit employee was unable to speak with a Union representative after 8:00 p.m.

Given the absence of a significant level of awareness among unit employees concerning the change, including that it was, in fact, unilateral; the relatively small number of employees that could possibly be affected; and the lack of evidence concerning the impact on those employees or their support for the Union; there is an insufficient basis for finding that unilateral change had a detrimental or lasting effect on employees four months later when a decertification petition was circulated. See Lexus of Concord, 343 NLRB No. 94 (2004), where the Board, in finding that a unilateral transfer of an employee did not satisfy the Master Slack causation test, noted that there was no evidence that any of the bargaining unit employees knew that the employer implemented the transfer without notice to and bargaining with the union.

Alleged Unlawful Lockout

As regards the lockout allegation, which concerns the Employer's December 2004 four-day lockout of striking employees, it is reasonable to infer that, unlike with the other alleged unlawful conduct at issue in this matter, all of the clerical unit employees were aware of the lockout, including the more than half of the unit employees who were not themselves locked out. However, the record does not demonstrate that the lockout remained a significant

concern among clerical unit employees seven months after the fact, when the decertification petition was filed.

To the contrary, the only testimony presented as to the lasting impact of the lockout on unit employees was that it remained a concern among them for about a month following the lockout, and there is no evidence that seven months later, when the decertification petition was filed, clerical unit employees were still discussing the matter or that it otherwise had a detrimental or lasting effect on employees, diminished the standing of the Union in their eyes so as to cause the disaffection, or adversely affected employees' morale, organizational activities, or union membership. Indeed, there is no evidence in the record from which it can be determined whether any of the alleged unfair labor practices, in fact, had a detrimental effect, for the Union presented no evidence of trends in the number of clerical unit employees attending Union meetings, or the number of clerical unit employees wearing Union insignia, or whether clerical unit employees appeared to be uncomfortable with Union representatives in the critical weeks and months leading to the decertification petition. See, e.g., Master Slack, supra, at 84. Thus, while the lockout likely had a wide impact at the time it occurred, there is no basis in the record from which to conclude that such impact persisted over the ensuing seven months so as to warrant the finding of a causal nexus between the lockout and the filing of the decertification petition. See LTD Ceramics, Inc., 341 NLRB 86, 89 (2004) (a causal connection cannot be found on the mere basis of a possibility that an employer's unlawful conduct affected employee support for the union).

Additional Considerations Affecting Decision

In determining that the unfair labor practice allegations at issue here, most of which predated the filing of the decertification petition by seven months or more, are too remote in

time to warrant the finding the finding of a causal nexus between them and the petition, I have been guided by various Board decisions addressing that same issue. Thus, in Quazite Corporation, 323 NLRB 511, 512 (1997), the Board found that several, serious unfair labor practices that occurred six months prior to the decertification involved in that case were too remote in time to affect employee decertification sentiments. There, the employer's conduct included denying employees' requests for union representation; promising employee benefits, including money, if employees resigned from the Union; unilaterally implementing changes in past practices; refusing to allow the union president to review his own attendance records; refusing to furnish attendance information; and bypassing the union and directly dealing with employees regarding grievances while refusing the union's request to process such grievances. In addition, two separate 8(a)(1) threats to striking employees that occurred immediately prior to the signing of the petition were not deemed sufficient for a finding of taint because they were isolated in nature and were not shown to have been disseminated to other employees.

In Garden Ridge Management, Inc., 347 NLRB No. 13 (2006), the Board found that the employer's unlawful failure over an 11-month period to meet and bargain with the union on a regular basis did not warrant a finding of taint. In so finding, the Board noted that there had been a five-month interval between the Employer's last refusal to meet on a regular basis and the circulation of the anti-union petition involved in that case. During that interval, as the Board noted, there was no showing that the employer had refused new requests by the union to meet and bargain. Moreover, as the Board noted, the employer's earlier refusals to meet on a regular basis were mitigated by the fact that negotiations had been ongoing, albeit infrequently, throughout the period in question. Here, as well, the Employer's alleged unfair

labor practices occurred in the context of the Employer's full and ongoing participation in contract negotiations up until the filing of the decertification petition, during which time the Employer recognized the Union and was prepared to bargain. See, also, Howe K Sipes, 319 NLRB 30 (1995) (failure to provide information requested seven months prior to decertification not found to be cause of employee disaffection); Airport Aviation Services, 292 NLRB 823, 824 (1989) (failure to respond to an October 1983 information request and to answer grievances in May 1984 not shown to have "direct impact on wages or benefits and their long term effects were imperceptible at the time the deauthorization activity [in August 1984]").

In disputing that the settled unfair labor practices are too remote in time for the finding of a nexus, the Union relies on Williams Enterprises, 312 NLRB 937, 939 (1993). However, such reliance is misplaced because the employer in Williams Enterprises engaged in conduct just before the filing of the petition in that case that, in effect, revived its earlier unlawful conduct. Thus, in Williams Enterprises the successor employer's plant superintendent held a meeting in August with 44 employees of the predecessor who had applied for employment with the successor employer, during which, he advised them that the employer intended to operate on a non-union basis. Thereafter, he proceeded to hire 39 employees, 36 of whom had attended the August meeting. Four months later, in December, the employer met again with the employees and told them it would be glad to have a decertification petition as a defense to an unfair labor practice charge filed by the union. The Board found that this statement reminded employees of the superintendent's August statement of intent to operate non-union. Accordingly, the Board found that the employer's coercive 8(a)(1) conduct in August had not dissipated four months later in December, when, on the heels of that month's

employee meeting, the decertification petition was presented to the employer. Here, unlike in Williams Enterprises, no conduct has been cited proximate to the filing of the decertification petition that could be viewed as reviving the effects of the Employer's earlier alleged unlawful conduct.

The Union's claim that the decertification petition was tainted by the Employer's alleged unfair labor practices is further undermined by the fact that the Union itself was determined to have engaged in unfair labor practices involving the bargaining unit. Thus, the Union entered into a settlement agreement in Case 32-CB-5887 regarding allegations that, during the contract negotiations at issue in this proceeding, it engaged in bad faith bargaining by limiting the hours and dates of bargaining sessions; insisting that scheduling be done through a mediator; arriving late to bargaining sessions; engaging in lengthy caucuses; discussing grievances and information requests unrelated to bargaining; and insisting on discussing permissive subjects, such as a 'master contract' proposal, which the Employer had already rejected. Employees were made aware of the Union's alleged unfair labor practices pursuant to the widely distributed Employer literature accusing the Union of engaging in dilatory tactics and insisting on a master contract. In contrast, the record reflects that, during the times that the Union is alleged to have engaged in such tactics, the Employer was prepared to meet and negotiate with the Union. By the time of the decertification petition, employees had expressed concerns about the prolonged contract negotiations, to which the Union's unlawful bargaining conduct must be deemed to have contributed. Moreover, employees expressed interest in being represented by the Teamsters Union. See Lexus of Concord, 343 NLRB No. 94 (2004), slip. op. p 3 (expressions of employee disaffection which arose prior to,

and independently of, the employer's unfair labor practice conduct are relevant to Master Slack inquiry).

In sum, having considered the Employer's alleged unfair labor practices in light of the Master Slack analysis, I have concluded that there is an insufficient basis for finding a causal nexus between those alleged unfair labor practices and the filing of the July 22, 2005 decertification petition. Accordingly, I find that the Contract Settlement Agreement executed by the Employer and Union does not require that the instant decertification petition be dismissed. See RCA del Caribe, 262 NLRB 963 (1982), where the Board, in deciding the legal consequences of a collective-bargaining agreement that had been negotiated following the filing of an election petition by a rival union, held that, if the rival union won the election, the collective-bargaining agreement would be null and void. I, therefore, direct that an election in this matter be conducted as set forth below.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6*)* and (7) of the Act.

4. The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time admitting registrars, van drivers, financial counselors, histology assistants, secretaries, analysts/coders, emergency registrars, unit clerks, clerks, transcriptions employees, medical records clerks, scheduling coordinators, medical office assistants, PBX operators, storekeepers, couriers, dark room technicians, outpatient registrars, insurance verifiers, acuity auditors, and materials and inventory control specialists employed at the Employer's 20103 Lake Cabot Road, Castro Valley, California facility, excluding all other employees, buyers, admitting assistants, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Health Care Workers West, Service Employees International Union. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in

such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). The undersigned shall make the list available to the Petitioner when the undersigned shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before **July 26, 2006.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (510) 637-3315. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001.

This request must be received by the Board in Washington by 5 p.m., EST on **August 2, 2006.** The request may **not** be filed by facsimile. In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance regarding electronic filing can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

Dated: July 19, 2006

William A. Baudler, Acting Regional Director
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